The Solicitors' Journal

Vol. 98 August 28, 1954 No. 35

CURRENT TOPICS

Lawyers in Politics

THE HOME SECRETARY'S address to the American Bar Association at Chicago on 19th August, on the lawyer's rôle in public life, did not fail to mention the great names of Lloyd George and Sir Kingsley Wood, two solicitors whose names are part of English history, together with those of Asquith, Haldane, Carson, F. E. Smith, Cripps and other great lawyers who have been distinguished in politics. The popular view, against which Sir David Maxwell Fyfe said every legal fibre in his body rose in protest, was expressed by Burke's: "For my part I must own that I wish the country to be governed by law, but not by lawyers." In the eyes of the layman, he said, the lawyer appeared to have a fatal fluency. Laymen thought that the lawyer, who was arguing so eloquently for one view of a political problem, could, with little effort, put the case as eloquently for the other side. Nevertheless, the record of political loyalty of the political lawyer was a proud one, he said. The lawyer, from his experience, had to master often at short notice problems of infinitely varied aspects of human affairs; unless a legislative assembly included a body of men who had the ability and the will to turn to a new subject and cover all facets, discussion and legislation, the subject was bound to suffer.

Hospital Authorities and the New Periods of Limitation

HOSPITAL authorities have now been notified, in a Ministry of Health memorandum dated 13th August, 1954, of the amendments to the law operative as from 4th June, 1954, under the Law Reform (Limitation of Actions, etc.) Act, 1954, as a result of which public authorities are now on the same footing as private persons as regards the period within which actions may be brought against them. The periods are now three years where damages are claimed in whole or in part for personal injuries for negligence, nuisance or breach of duty, and six years for other cases of breach of contract or tort. Where a cause of action arose before 4th June, 1954, the old period or the new period will apply, whichever gives the later expiry date, and hospitals are informed that, if proceedings are commenced after the expiry of the appropriate period of limitation, the statutory limitation should be pleaded automatically without reference to the Ministry. As regards cases in which the time for bringing proceedings in respect of a cause of action expired before 4th June, 1954, proceedings commenced before the end of 1954 should be dealt with according to previous instructions; in proceedings commenced after the end of 1954 which would be time-barred if the new periods of limitation were applicable, the limitation should be pleaded, it is stated, without reference to the Ministry; in proceedings commenced after the end of 1954 which would not be time-barred if the new periods were applicable, the limitation should not be pleaded without the approval of the Ministry. Any case in which the pleading of the old limitation has been approved by the Ministry, the memorandum states, should not be reopened.

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Summary Trial of Minor Offences

FOR the saving of the time of witnesses at the summary trial of minor offences, Home Office circular No. 66/1954 (*ante*, p. 186) recommended a form of document to accompany summonses in appropriate cases, inviting defendants to intimate whether (*a*) they wished to be excused attendance, or (*b*) they admitted the charge. It may be recalled that following the issue of that circular, Mr. KENNETH BROWN wrote in *The Times* of 9th April criticising a statement in the circular that the prosecution may intimate that the defendant's attendance is desired, where he has previous convictions which cannot be proved in his absence (*ante*, p. 257), on the ground that it would tend to bring the fact of previous convictions to the notice of the magistrates, before the defendant had been found guilty. Mr. J. P. EDDY, Q.C., replied denying that there would be this tendency (*ante*, p. 274). The Home Office issued a further circular on 28th July, 1954 (H.O. No. 149/1954), in which they suggested that a footnote should be added to the notice to be sent to defendants in appropriate cases in the following terms: "If you intend to appear by solicitor or counsel, you would be well advised not to complete this form without consulting your solicitor," or words to the like effect.

Hire-Purchase Finance and the Capital Issues Committee

A NEW approach to the question of control of hire-purchase finance is outlined in a letter from the CHANCELLOR OF THE EXCHEQUER to LORD KENNET, chairman of the Capital Issues Committee. He recalled the statement made on the removal of the controls over hire-purchase and credit-sale transactions last month that there was no change in the general limitation of finance for hire purchase. He did not think that a rigid ban was now appropriate, but asked the committee to deal with hire-purchase applications on their merits, having regard to the purposes for which the money was being raised and bearing the national interest in mind. All applications to raise £50,000 or more of fresh capital are scrutinised by the committee, but the formation of many small companies with less than £50,000 capital has weakened the control. It is possible that the publication of the letter on 21st August was not unconnected with Mr. J. GIBSON JARVIE'S complaint in his address to the shareholders of the United Dominions Trust, Ltd., that he had three times failed to persuade the committee of the urgency of an addition to the capital of his company. In future applications by hire-purchase finance companies for further finance, it will probably be important to stress the volume of financing the supply of industrial equipment carried on by the applicant in proportion to the volume of the financing of consumer credit. Meanwhile, Mr. Gibson Jarvie's complaint against the committee retains full force and validity—applicants are granted no hearing, no reason is given, and there is no appeal. Well may an unsuccessful applicant cry, "Crichel Down again."

An Ancient Family of Solicitors

IN writing that the Crosse family of Exeter had created a record in the annals of The Law Society by having five of its members qualified as solicitors (*ante*, p. 546), we were not, of course, including those whose businesses have devolved through generations of ancestors to their present owners. Such firms often have had many more than five solicitor members of the same "family," in the broader sense of the word. One family of this kind is that which has supplied at least nine members to the firm now called E. G. and J. W. Chester, which has been in practice in Southwark, London, since 1783, and in their present office in Newington Butts since 1837. The great-great-grandfather of the present partners founded the firm, which has been carried on ever since exclusively by one or more members of his family, of whom at least nine became qualified solicitors. The Chesters are descended from an ancient family. One of their earliest recorded ancestors, born in 1510, was admitted to Gray's Inn in 1552, was one of the Gentlemen Ushers of the King's Chamber, was knighted in 1552 and became High Sheriff of Herts and Essex in 1565. Not least among the public services rendered by members of the family was the erection, under the auspices of Mr. Edward Chester, as trustee of the will of Miss I. F. Squire, of the Squire Law Library at Cambridge. Mr. MICHAEL WOODROFFE CHESTER, son of Mr. JOHN GRANADO CHESTER, a partner in the firm, is reading law at Cambridge and aspires to be the tenth member of the family to be a solicitor. We shall be glad to hear of similar records.

The Public Trustee's Report for 1953-1954

DETAILS of increased expenses and an increased deficit form part of the Public Trustee's account of his stewardship in the Forty-sixth General Report of the Public Trustee for 1953–54. The expenses for the year increased by £25,920 over those for the previous year, most of the increase consisting of a £16,215 increase in salaries. The year's working resulted in a deficit of £71,232, increasing the accumulated deficit to £189,728. Receipts, on the other hand, increased by £30,903. Cases accepted were forty-eight fewer in number, but £829,668 more in value, than in the previous year. The average acceptance fee rose from £104 to £123. The total value of trusts under administration at 31st March, 1954, was estimated to be £269,651,585, of which nearly £231m. comprised stocks, shares and mortgages, and only £33m. comprised real estate. The number of staff employed at 31st March, 1954, was 670 as compared with 691 at 31st March, 1953.

Prosecutions for Traffic Offences

NO great cheer can be drawn from the annual return of offences relating to motor vehicles published on 18th August, 1954 (H.M. Stationery Office, Cmd. 272, 1s. 9d.). Convictions for reckless or dangerous driving, careless driving and exceeding the speed limit in built-up areas increased by over 7 per cent. As an offset, there is a small decrease in the number of offences against the pedestrian crossings regulations, and in those relating to lights, noise and brakes. There was a more comforting decrease in the number of offences of speeding by goods vehicles, and the total number of cases dealt with by prosecution fell from 394,392 to 380,532. There was an increase from 17,155 to 18,821 in disqualifications for driving. The total amount of fines imposed was £690,376 as against £687,514 in 1952. More encouraging to those who believe that unremitting effort can improve road behaviour and lessen loss of life and limb was the statement of the MINISTER OF TRANSPORT on the occasion of his visit to Birmingham on 18th August, 1954, as part of a road safety campaign. He pointed out that the figure of 7,343 killed on the roads in 1934 had never since been reached despite the doubling of traffic and the four million increase in population since then. In 1953 deaths were 5,090. No one dare say that this figure is not bad enough. One measure of its gravity is that the reduction, which is not sensational, has taken twenty years to accomplish.

A Conveyancer's Diary

LIABILITIES OF A SURETY ON AN ADMINISTRATION BOND

SOLICITORS are not infrequently asked to become sureties to an administration bond, and the recent decision of the Court of Appeal in *Harvell* v. *Foster* [1954] 3 W.L.R. 351, and p. 540, *ante*, on the liability of such sureties should be carefully studied before an obligation of this kind is undertaken in the future. The extent of this obligation has perhaps been underestimated up till now.

In this case the plaintiff was appointed the sole executrix and universal legatee under the will of her father, who died while she was still under twenty-one years of age. The provisions of s. 160 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, to the effect that where there is a minority administration must be granted either to a trust corporation (with or without an individual) or to not less than two individuals, are not regarded by the Probate Division as applicable to the case of a grant during the minority of an infant executor pursuant to s. 165 of this Act, even though the infant is also beneficially interested. The latter section provides that, in the case with which it deals, administration with the will annexed shall be granted to the guardian of the infant executor or to such other person as the court thinks fit until the infant attains the age of twenty-one years, and on his attaining that age, but not before, probate of the will may be granted to him. In *Harvell* v. *Foster* the plaintiff was married, and the defendants, who were solicitors and who advised her in connection with her father's estate, made an application to the Principal Probate Registry for the issue to the plaintiff's husband of a grant with the will annexed during the plaintiff's minority. In compliance with s. 167 (1) of the Act, the husband as the intended administrator, and the two defendants as sureties, gave to the principal probate registrar a joint and several administration bond in the form prescribed by the rules, and a grant was therefore made to the husband as asked for.

As some parts of this bond were scrutinised in detail in the Court of Appeal it is desirable to set out its language, or some of it, *in extenso*. In it the husband was described as " the intended administrator (with the will) of all the estate which by law devolves on and vests in the personal representative of the said deceased for the use and benefit of [the plaintiff] until she shall attain the age of twenty-one years " ; and the bond was conditioned so that if the administrator should make an inventory of the said estate whenever required by law so to do " and the said estate [should] well and truly administer according to law and further [should] make or cause to be made a just and true account of the administration of the said estate whenever required by law so to do " the obligation under the bond was to become void.

The defendants, as the agents of the plaintiff's husband, got in and realised the assets of the estate and paid the funeral and administration expenses. They then paid the moneys representing the net residuary estate to the husband. The latter paid some of these moneys over to the plaintiff but did not account to her for the remainder. The plaintiff and her husband separated and the husband disappeared, having in effect converted the bulk of the estate to his own use. Ultimately the plaintiff, having attained the age of twenty-one years, obtained an order for the assignment to her of the administration bond, and in this action she claimed that she was entitled to recover from the defendants as sureties to the bond the amount of the estate for which her husband, the administrator, had failed to account to her.

The action came on for hearing before Lord Goddard, L.C.J., who dismissed it. On appeal, this decision was reversed. The point on which the case turned, and which occasioned this difference of judicial opinion, is one of notorious difficulty, namely, the relationship between the twin offices of administrator and trustee when these are filled by the same person and the time at which it can be said (if it can be ever said) that the one office is discharged so that only the other is left. The argument submitted to Lord Goddard on behalf of the defendants was that the object of the bond had been only to ensure the due winding up of the estate until the residue was ascertained and in the administrator's hands, and that as soon as the assets were got in and the liabilities paid the administration of the estate was finished and the character of the husband changed from that of an administrator to that of a trustee. Lord Goddard accepted this view: in his judgment, it would be wrong unless compelled to do so to construe the bond so as to make it, in effect, one for the due performance of the bondsman's duties as a trustee. And this *prima facie* view was, in Lord Goddard's judgment, supported by the authorities, notably the decision in *Re Ponder* [1921] 2 Ch. 59.

The actual question which arose for decision in that case was whether an administrator of an intestate's estate could invoke the power of the court to appoint a new trustee to act with the administrator in relation to certain parts of the estate which the administrator had divided into separate funds, and which were held for the persons respectively entitled thereto under the old law for the distribution of intestates' estates. This could only be done on the footing that the administrator was a trustee. Sargant, J., held that the administrator had, in fact, constituted herself a trustee, and in his judgment he said this: ". . . when an estate has been wound up, and the trust property is in the hands of an executor freed from the administration of the estate, the office is then changed from that of executor to that of a trustee." Lord Goddard cited this passage in his judgment, and also referred to other cases on the point, including *Re Yerburgh* [1928] W.N. 208, and his conclusion on the facts and on the law in the case before him was that the administration ceased when the estate was realised and was clear of the deceased's debts, and that when the administration was at an end the bond became void: it could not be held to be a bond to secure the performance of the administrator's duties as a trustee.

The Court of Appeal based its different conclusion on these facts on two grounds. First, as a matter of the construction of the administration bond itself, as the administrator had misappropriated a large part of the estate, he had not " well and truly administered it according to law " within the meaning of the bond. Further, if this formula was not apt (as the court thought it was) to render the bondsmen liable, according to its natural sense and meaning, as upon a breach of the condition well and truly to administer, the words which followed in the bond did so, since the obligation to make a true account of the administration of the estate must persist until at least the end of the period of the grant. Secondly, both the cases and the statute law supported this view. The proposition

which the excerpt from the judgment of Sargant, J., in *Re Ponder* relied upon by Lord Goddard, if read without qualification, seemed to support, that because a personal representative who has cleared the estate becomes a trustee of the net residue for the persons beneficially entitled the clearing of the estate necessarily and automatically discharges him from his obligations as personal representative, could not be accepted; the true view was that the duty of an administrator as such must at least extend to paying the funeral and testamentary expenses and debts and legacies (if any), and where, as in the case before the court, immediate distribution is impossible owing to the infancy of the person beneficially entitled, retaining the net residue in trust for the infant. The Master of the Rolls, who delivered the judgment of the court, referred to various statutory provisions, such as the definition of "trustee" in the Trustee Act, 1925, which includes the office of the personal representative, and various provisions of the Administration of Estates Act, 1925, in which various duties of an administrator are expressed in terms of a trust; of these provisions s. 42 seemed the most important, this being the section which empowers personal representatives, where an infant is entitled absolutely to, *inter alia*, the residuary estate or a share therein, to appoint either a trust corporation or two or more individuals to be the trustee or trustees thereof for the infant, and so to discharge themselves from all further liability in respect of the infant's interest. That provision seemed to carry a necessary implication that until a personal representative having in his hands assets to which an infant is absolutely entitled either avails himself of this statutory method of discharging himself as personal representative from all further liability in regard to those assets, or accounts for and pays them over to the infant when the infant attains the age of twenty-one years, he remains liable for them in his capacity as personal representative.

Doubtless the misappropriation which took place in this case would have been much more unlikely to have taken place if there had been two administrators instead of one, and some amendment of the present law, or change in the present practice, may be desirable to ensure that in all cases where an infant is beneficially interested in the estate a grant should be made to not less than two individuals, or to a trust corporation, irrespective of whether the infant is a sole executor and the case therefore falls within s. 165 of the Judicature Act, or not. The interpretation of that section and s. 160 (1) is not as clear as it might be, but on one view at any rate a change in the present practice may be possible without amendment of either provision. That is something for future consideration. A more immediate lesson which can be drawn from this decision is that where there is only a single administrator and an infant is beneficially entitled, solicitors who have become sureties to the administration bond may reasonably insist that, when the net residue has been realised, it should be vested in a trustee or trustees under s. 42 of the Administration of Estates Act, 1925, and make this a condition of their becoming sureties. There may be circumstances in which a similar precaution would be justified also in the more ordinary case of a grant being made to two or more administrators under s. 160 (1) of the Judicature Act, for although that was not the case directly covered by the decision in *Harvell* v. *Foster*, there is no reason why it should not apply equally to such a case, should it arise.

"A B C"

Landlord and Tenant Notebook

THE HOUSING REPAIRS AND RENTS ACT, 1954—III

CONTROL: THE "OTHER AMENDMENTS"

THE "other amendments of Rent Acts" to be found in s. 33 *et seq.* of the new Act are mainly concerned with the scope of those Acts. Perhaps the most interesting provision is that of s. 35, by which dwelling-houses converted or erected after the commencement of the Act (30th August, 1954) are excluded from control; an amendment which was not in the Bill as originally presented. It will be recalled that a similar change was made after World War I, namely by the Increase of Rent, etc. (Restrictions) Act, 1919, s. 8 of which was replaced by s. 12 (9) of the 1920 Act. The former was expressed to affect "houses erected after or in the course of erection at the passing of" the Act; the latter added "any dwelling-house which has been since that date or was at that date being *bona fide* reconstructed . . . into two or more separate and self-contained flats or tenements"; s. 35 of the new Act is rather more elaborate, and it may be that experience accounts for the abandoning of old and the introduction of new expressions, especially in the case of "conversion": "separate and self-contained premises produced by conversion, after the commencement of this Act, of other premises, with or without the addition of premises erected after the commencement of this Act." The former enactments spoke of "*bona fide* reconstructed by way of conversion" into two or more separate and self-contained flats or tenements. "*Bona fide*" occasioned difficulties; likewise, it may well be that the use of the word "premises" will avoid problems which may be said to have sprung from use of the expression "flats or tenements."

Rather more elaborate are the steps taken by s. 33 to de-control, as from 1st March, 1955 (unless previously de-controlled), four classes of tenancies: those where the landlord's interest belongs to (i) a local authority; (ii) a New Towns Act, 1946, development corporation; (iii) a housing association as defined by the Housing Act, 1936, provided that the premises were provided by the association by an arrangement under a specified provision in a Housing Act (s. 29 of the 1930 Act, s. 27 of the 1935 Act, s. 94 of the 1936 Act), or with the assistance of a local authority under the Housing Act, 1923, s. 2; or the housing association is one registered under the Industrial and Provident Societies Act, 1893, and the premises comprised in the tenancy were provided as part of its purposes; (iv) a housing trust subject to the jurisdiction of the Charity Commissioners. Presumably the underlying idea is that which was expressed by Greene, M.R., in *Shelley* v. *London County Council* [1948] 1 K.B. 274 (C.A.), who considered that local authorities, at all events, were "socially much more responsible" landlords than were private owners, and that they "might be trusted, one would have thought, to exercise their powers in a public-spirited and fair way." One who would not so have thought might be Lord du Parcq, who dissented when the House of Lords upheld the decision of the Court of Appeal ([1949] A.C. 56); and events reported from time to time in the Press suggest that there are many others who consider the idea a bad one. Parliament has, however, maintained the distinction. Sub-tenants are to lose protection with their immediate landlords.

The next section deals with the position which will arise if a de-controlled dwelling-house, which has become de-controlled because it belongs to one of the four classes de-controlled by s. 33, becomes privately owned and the transition is not due to a sale effected under the Housing Act, 1952, s. 3; and provides that anyone who then has an interest in such a house or proposes to acquire such an interest may apply to the local authority to fix the standard rent (in the case of sales under the 1952 Housing Act, the rent can be limited for five years under s. 3 of that Act). In the case of intended acquisition, the determination will not have effect unless the intention is carried out. The effect is re-control, i.e., both as regards permitted rent and as regards security of tenure.

Such a determination of standard rent will obviate the risk of someone delving into past history in the hope of finding a first letting at a low figure which, as *Davies* v. *Warwick* [1943] K.B. 329 (C.A.) showed, may cause an unexpected upset (though the references to "some almost prehistoric letting" and a letting "five hundred years ago" do, apart from the difficulty of proof, rather exaggerate the position: there could be control before rating came into being). The same will apply to part of what is enacted by s. 37, in which attention is directed to the maximum rents fixed under a different Housing Act, that of 1949, on the occasions of grants for providing or improving dwelling-houses. By s. 37 of the new Act, the maximum rent so fixed is to be the standard rent as from the date when the Rent Acts become applicable or as from the date on which the local authority certify that improvement works have been completed to their satisfaction, but the operation of the Increase of Rent etc. Restrictions Act, 1920, s. 2 (1) (*c*) and (*d*)—the old control 15 per cent. and 25 per cent. increases—is excluded.

The Landlord and Tenant (Rent Control) Act, 1949, has undergone some modifications. Section 36 makes an *increase* of standard rent by a tribunal effective, i.e., when the "reasonable rent" determined by such a body is more than what would be the standard rent, it is to be the standard rent. The provision is not fully retrospective, but in the case of existing determinations of reasonable rent exceeding the standard rent the landlord can effect an increase by a four weeks' notice (in the prescribed form). Then, properties managed by housing associations (Housing Act, 1949, type) or New Towns Act, 1946, development corporations are no longer excluded from the jurisdiction of rent tribunals, but applications to fix rents of houses which have had maximum rents fixed under the Housing Act, 1949, s. 22 (improvement grant), or rents limited under the Housing Act, 1952, s. 3 (on sale of council house), or which can have rents fixed under s. 34 of the new Act (see above), can no longer be entertained. The effect is to divide into two classified groups the class formerly dealt with by the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (7) (*b*) (now repealed), which excluded from the tribunal's jurisdiction houses which were subject to any limitation of rent imposed by or under any enactment not contained in the principal Acts or that Act: exclusion being retained by some houses which would answer to the comprehensive description, but others being brought within the purview of s. 1 of the 1949 Act.

Other amendments of the 1949 Act concern the restrictions on premiums. It is no longer illegal to require a premium on the *assignment* of a term which was granted for over twenty-one years, and this applies to any tenancy which follows a more than twenty-one-year term, including one created by holding over; also to an ensuing tenancy of part of a property which was held under a more than twenty-one-years' lease (s. 38). There is also some relaxation of the savings affecting premiums contained in s. 2 of the 1949 Act, i.e., those by which assignors of terms were permitted to require payments of four kinds. It will no longer be an offence to require payment of outgoings referable to any period *before* the assignment takes effect; and "reasonably incurred" and "reasonable" are eliminated from the savings in favour of amounts of expenditure incurred in alteration, etc., and amounts paid in respect of goodwill (s. 39 (2)).

The above summarises the more important "other" amendments, but mention should be made of a variety of minor changes which will affect some people. A carefully qualified right to increase a rent which includes payments for services is conferred by s. 40; the standard rent must be one fixed by a pre-2nd September, 1939, letting, and the services must be provided under the agreement (for the importance of this, see *Property Holding Co., Ltd.* v. *Mischeff* [1948] A.C. 291); the increase may either be negotiated and recorded in writing, or be determined by a rent tribunal. Protection is extended by s. 41 to some otherwise unprotected sub-tenants of parts of premises, i.e., to those whose tenancies are carved out of unprotected tenancies (*Cow* v. *Casey* [1949] 1 K.B. 474 (C.A.)). It must be rare for, say, a daughter of a protected tenant to find herself homeless on his death because her mother has left him; should this happen, in future, she will be able to rely on a further amendment of the famous s. 12 (1) (*g*) of the Act of 1920 effected by s. 42 of the new statute. Then, the agricultural "certificate of need" ground for possession has been done away with by s. 43. And landlords faced with increases in rates will find a careful study of s. 44 well worth while, elaborate though its provisions be; for they are designed to remove the grievance experienced when a rate is not made in time to enable the landlord to pass it, or pass all of it, on to the tenant.

Before leaving the subject I would mention that, besides the new regulations affecting prescribed forms, applications to rent tribunals, and increases of rent which have been mentioned, the new Act has occasioned the issue by the Lord Chancellor of new county court rules with forms of summonses to determine standard rent, of application to determine whether work of repair has been carried out, etc., which amend and add to the amended Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920; but are known, more shortly, as "The Rent (Restriction) Rules, 1954 (S.I. 1954 No. 1073 (L. 10))."

R. B.

OBITUARY

MR. D. E. S. BROWNE

Mr. Daniel Edward Stephens Browne, solicitor, of Cardiff, died on 19th August, aged 77. From 1948–1949 he was president of the Cardiff and District Law Society. For many years he represented the Automobile Association. He was admitted in 1907.

MR. G. JONES

Mr. Gwilym Jones, retired solicitor, of Mountain Ash, died on 18th August, aged 84. Admitted in 1895, he was a former High Constable of Miskin Higher.

MR. O. D. P. PAGET-COOKE

Mr. Oliver Dayrell Paget Paget-Cooke, M.V.O., solicitor, of Lincoln's Inn, W.C.2, died recently, aged 63. He was honorary solicitor to Queen Mary's Maternity Home. Admitted in 1920, he was appointed M.V.O. in 1933.

MR. E. G. POTTER

Mr. Edward Gybbon Potter, solicitor, of Walsall, died recently, aged 80. He was solicitor and agent for the Earl of Bradford for fifty years, relinquishing that position in 1951. He was admitted in 1904.

HERE AND THERE

NEW PARLOUR GAME

"THE Police Inspector then produced to the court a policeman's helmet containing snooker balls and a bucket of borrowed oranges." Reading that statement *in vacuo*, would you care to guess where it occurred, what system of jurisprudence was being administered and what was the nature and object of the proceedings? My own uninstructed guess would have been to place it in an unpublished work by Lewis Carroll or a hitherto undiscovered opera by Gilbert and Sullivan or maybe in one of the films of the Marx Brothers, or again, in the knockabout of an old-fashioned harlequinade. If, however, I was assured that it happened in a real case in a real place in the serious discussion of a real legal issue, I would grope my way very cautiously towards a solution. Can it possibly be yet another case of life imitating fiction, of Scotland Yard or the Sureté imitating Father Brown or Sherlock Holmes or Poirot? Can the snooker balls and the oranges (blood oranges, of course) be crazy but infallible clues in the investigation as to how Brigadier General Cornworthy came to be strangled with his own bootlaces in the billiard room at the Bishop's palace? Or have snooker balls and oranges and helmets and buckets some symbolic or esoteric significance in Balkan revolutionary conspiracy or South American civil war? Or have they a counter-revolutionary significance which could make them final, conclusive and damning in an Iron Curtain propaganda trial? You see, every time one clutches at the end of a chain of reasoning, it eludes one's grasp as if it had been greased with engine oil. Well, try again. Supposing it had happened in Huddersfield? Yes, I did say Huddersfield. That's where it did happen. But *why?* Well, you see, they were prosecuting the Economic Stores (Halifax), Ltd. You don't see? Then you must be a foreigner uninitiated into the British way of life and the secret of that plain, sturdy, unimaginative common sense that has made us what we are. It was just a prosecution under the Betting and Lotteries Act, 1934. The question was whether a competition to estimate the number of eggs in a bucket did or did not depend to a substantial degree on the exercise of skill, and the stipendiary magistrate held that it did not. To aid him in his decision the Huddersfield police force had devised a number of ingenious parlour games for witnesses, who were asked to guess the weight of a plate of sugar or a bowl of meal and to say the number of marbles or peas in a jar. At any moment now they will probably be asked to give a repeat performance on television. Before Simpson's in Cheapside was burnt in the war, it was the pleasant custom at the "fish ordinary" there to invite the guests to guess the height, girth and weight of the cheese. If anyone succeeded (and it did happen) there were cigars and champagne all round "on the house." I suppose persistent lunchers there could acquire a substantial degree of skill in estimating.

CONVINCING DEMONSTRATION

THE television people should keep a very vigilant eye on the courts. If any of their talent scouts or ideas men had been at the London Sessions recently they would have observed a scene well worthy of a repeat performance, a demonstration by a reformed pickpocket of the procedure of stealing a man's wallet. "We always work in a crowd," he said, "with one or more accomplices. One shrouds one's hands in a newspaper or raincoat and the victim must never be looking at you." Counsel asked him: "Would you ever dream of picking a man's pocket while he was looking at you?" and he answered: "I would be a fool if I did." He was charged with having picked a man's pocket under cover of asking him for a light, but that, he said, would be just silly. He admitted that he had been a professional pickpocket, "to my sorrow." He did not go so far as to claim to be a specialist. "I have made as many mistakes as I have had successes." In a way, he said, the job was a lucky dip. He might have added that in that it was like legal procedure. In this case the dip into the cornucopia of British justice was a lucky one. He got an acquittal.

THE SUPER EXPERT

IT is not the first time that a professional malefactor has given a court demonstration. The most astonishing instance was that of Thomas Caseley, one of the fathers of the art of safe cracking. In 1865 he made a haul of 800 gold watches and 160 gold chains from a jeweller in Cornhill. He was caught and sentenced, but his cheerful contempt for the safes he had broken open caused the jeweller to sue the firm who had supplied them for the value of the watches. In the action Caseley was called as an expert witness and arrived at the court carrying his tools in a violin case. The safes, he explained, had resisted the "tin opener," a steel bar with a cutting knife on the end of it. With handle extensions screwed on, it had enormous leverage and cutting power. Next, the gang had tried wedges forced between the jamb and the door. The wedges worked. One safe, however, demanded the use of an "unlawful bar." To the Lord Chief Justice's interested query as to what that might mean, Caseley explained: "A bar, my lord, that would not be used to commit a burglary. The tools we use in a burglary are called lawful tools. We call them unlawful when they are too long or when they make a noise." When counsel asked: "You used the best class of lawful tools at Cornhill, I suppose?" the witness rejoined with a slightly puzzled expression: "Do you mean the word as a barrister would use it or as a burglar would use it?" "I mean the word in your sense" said counsel. When in 1867, at the Paris Exhibition, a German engineer challenged all safe breakers to open his safe, Caseley took up the gage. Turning up again with his old violin case he beat the German production in twenty minutes for the honour of British craftsmanship and cracksmanship.

RICHARD ROE.

TALKING "SHOP"

OLD CRUSTY RUMBOLD'S LETTERS TO HIS SON—III

My dear Richard,

Do not become dejected because your first attempts at drafting legal documents have fallen a little flat. Drafting is a craft, and many long years of study and practice go to the making of a skilled craftsman. It is also, in my judgment, an *art*—more pedestrian than the great arts of painting, music and literature, but justly comparable with them in its demands upon the creative artist. Did I say artist? Well, let it stand, or as you will have learnt to say by now: *stet.*

As your experience in this field expands you will learn to distinguish the qualities of draftsmen. Many are competent, neither more nor less. A few—but also too many—are unbelievably bungling and careless. A very few of our

profession, and more in another place—I refer, of course, to conveyancing counsel—may be accounted master-craftsmen and true artists. And the more you have yourself tussled with intractable drafts the better will you be able to enjoy a document by a master hand; it is a genuine and, perhaps, unique pleasure such as a connoisseur alone can savour—and I hope that you will become a connoisseur.

I seldom see a bad draft or a badly drafted document but I think of the words of the Preacher: that which is far off and exceedingly deep, who can find it out? But if the draft or the document be good, then the words are as goads and as nails fastened by the masters of assemblies.

In practice you will find that there are not only different standards of draftsmanship but many schools of thought and various methods. Some people despise—or affect to despise—precedent books, but others seem to be mesmerised by them. Some people like the old forms and are fond of archaic language; others make a point of drafting in what they are pleased to suppose is a less stuffy manner (in practice some painful neologism or a tongue-twister like "witnesses" is about all that results). One man will dictate his drafts with the utmost abandon, telling Miss Prendergast to fill in the gaps with enormous chunks from an old will or settlement. So far as he is concerned, the words are no sooner out of his mouth than the thing is as good as engrossed. Another will play off Messrs. Key and Elphinstone against the Encyclopædia of Forms and Precedents, and Prideaux against Davidson, and the winner of each round against the other, and then decide that it should have been a four-ball match after all. Just naturally he finishes up with a draft that looks like the musical score of "The People that Walked in Darkness" and reads like an acrostic. Frankly, I cannot commend any of these systems.

In the choice of your drafting methods your own temperament and experience come first; but you must also have regard to the difficulty (not to be confused with the length) of the document and the amount of time that you have at your disposal. These matters are all variable and make it impossible to lay down any hard and fast rules. It is unlikely, at least during the early part of your articles, that you will rank for the services of a shorthand-typist, but in case you should do so later I would warn you against being in too much of a hurry to dictate documents. Wait until you have had some years of experience of drafting by hand or, at worst, confine your dictation to documents in a familiar form.

Dictation unquestionably accounts for much of the slip-shod drafting that is a commonplace in solicitors' offices nowadays. If you must dictate—and the exigencies of the service may compel you to do so from time to time—you will find it a good plan to jot down in advance the main heading or theme of each recital and operative clause. You can then be sure of the sequence, and getting the sequence right is half the battle. Be careful also to note down abbreviations or definitions that you propose to use. Nothing will throw you out more, nor waste so much of your own and your secretary's time, than your tumbling to it half-way through your oration that Mrs. *T U V W X Y Z* could have been called "the wife" for short and that seventeen lines in the fifth recital might have been conveniently labelled "the wife's appointed share." These advance notes, besides giving you confidence, if you need it, may halve your labour, and (what is even more important) the labour of your limited reading public.

Unless you wish pity to blow the horrid deed in every eye, do not suffer vaulting ambition to prick the sides of your intent. If you are driven, by a client's importunities or your own laches or otherwise, to dictate one of those less familiar documents, dictate the simpler clauses of it—let us hope that there are some or you will be in evil case—and resort to pen and ink for the real "stumors." It will probably save time and trouble in the end. Dictate the "stumor" and the chances are that you will spend more time upon altering it later than you would have taken to shape it correctly in manuscript at the outset.

You will infer that I am prejudiced against dictation, but this is not so; I am prejudiced only against ill-advised dictation. As you become more and more experienced at manuscript drafting and dictation of letters (an entirely different problem and I say nothing about it here) you may gradually widen your scope and attempt the dictation of progressively more complex drafts. But meanwhile you would be well advised to treat the pen as the proper tool for drafting; the tongue will do well enough for the telephone and for most correspondence.

Modern improvements in office administration, such as skirts and dictaphones, have tended to foster the illusion that the pen is too slow for stream-lined business. In my opinion, the pen is fast enough if it is in a skilled hand and moving under the control of an ordered brain. It is not so much a question of how fast you write or dictate, but whether the image is clear in your mind and how much facility you have for expressing yourself. R. L. Stevenson, suffering continual hæmorrhages and hardly allowed to speak, wrote the first draft of "Dr. Jekyll and Mr. Hyde" lying on his sick-bed, in three days. He then scrapped it and wrote an entirely fresh draft of about the same length in another three days. Sixty thousand words in six days, an average of 10,000 words or, say, 125 folios a day. (You may occasionally prepare a settlement or will that runs to more than 100 folios, but not, I think, very often.)

Stevenson's effort would probably pale beside some of the prodigies of frenzied labour achieved by Honoré de Balzac, but then, as you may know, he would write for some sixteen hours a day, starting punctually at midnight. There should be no need for you to emulate either of these authors. I just mention them in passing and as a reminder that the pen has its uses. If you are endowed with the genius of a Keats you may justifiably revile your pen for its slowness to glean your teeming brain; otherwise use it until you can be sure of doing better without it.

Many people suppose that by a little crafty drafting you can turn black into white or perform other conjuring tricks and this delusion lies at the root of many an apparent "drafting" difficulty. By the simple expedient of asking yourself what you are about you may sometimes discover that you are engaged upon some absurdity. It may be that you are at one and the same time making a gift absolute and conditional, or withholding the income of an absolutely vested gift contrary to *Sanders* v. *Vautier*, or predicating of a legatee that at twenty-five years of age he will be married and have a child. Such simple points often escape notice in the course of taking instructions from a client and must be straightened out in the drafting. If the drafting is tough, as like as not it is because you are running your head against a brick wall.

> To think that two and two are four
> And neither five nor three
> The heart of man has long been sore
> And long 'tis like to be.

It is a good working rule that if your draft sounds wrong, it *is* wrong. It does not, of course, follow that if it sounds right, it *is* right. Test your drafts for sound *and* sense.

Remember that, though you may not be a skilful draftsman, it is inexcusable to be a careless one. Your clients will judge you largely by your personality and advice in interviews and correspondence, but other solicitors will judge you to some extent at least by your drafts. Slovenly drafting must be set down to bad manners, for you merely put someone else to the trouble of correcting your mistakes. There is no excuse for the draftsman who puts " hereinafter called ' the settlement ' " in the first recital and refers back to it under some other name—yet this is so commonly done that it may almost be taken for granted. By the way, you will usually find that skilful draftsmen are also careful draftsmen, but there are notable exceptions to this rule, and for this reason it is always just as well to check counsel's draft with loving care. Your client will not, as a rule, be technically qualified to praise counsel's finesse in circumventing the perpetuity rule, but he will be quick enough to spot the mis-spelling of his own name, and you will be in for trouble if you rank him a lieutenant-colonel when he is a lieutenant-general or call his brother his " bother."

Sooner or later you will almost certainly suffer an attack of draftsman's cramp. I hope it may be of short duration, but occasionally a severe attack will last for some years or cause drafting paralysis for life; you should therefore beware of it. The approach of the disease is insidious and is seldom recognised by the victim. In the early stages there is a tendency to distrust the English language (linguistic phobia) and to indulge in tautology, evasion and excessive use of synonyms. As the disease advances, the patient may suffer sharp attacks of persecution mania—he is haunted by the spectres of words and phrases, all gibbering at him hollowly from the documents in which he fondly trusts that he has buried them. Such visitations may be followed by a maniac-depressive condition in which nothing appears right unless it is expressed as a double negative and sunk full fathom five in provisos.

The best cure for this complaint is a wholesome draught of common sense. But until you have suffered from it yourself, do not scoff at its unhappy victims. The English language, with its enormous vocabulary, is, like public policy, a mettlesome horse; you may be jogging along much as usual when it bucks at a piece of paper and deposits you in a ditch full of nettles and dirty water. Sir Ernest Gowers (citing Dr. Glanville Williams) has reminded us that it is in the nature of words that they have a " penumbra of uncertainty." Most people add to the confusion with an over-lapping " penumbra of uncertainty " of their own. It is the task of the draftsman to avoid these shadowy places, but he is a genius if he always succeeds. " All to mother " says your client. It's clear to him and it's clear to you. But perhaps he didn't tell you that for thirty years he has called his wife " mother " ?

Your affectionate father,

Crust Rumbold.

" Escrow "

NOTES OF CASES

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

CRIMINAL LAW: CARRYING FIREARM WITHOUT LAWFUL AUTHORITY: "LAWFUL EXCUSE"

Wong Pooh Yin *v.* Public Prosecutor

Lord MacDermott, Lord Cohen and Mr. L. M. D. de Silva. 30th June, 1954

Appeal (No. 9 of 1954) from a judgment of the Court of Appeal of the Federation of Malaya (5th October, 1953) whereby the appellant's appeal from a decision of the High Court at Kota Bharu, Kelantan, convicting him of carrying a firearm without lawful authority under reg. 4 (1) (*a*) of the Emergency Regulations, 1951, and sentencing him to death, was dismissed.

The Emergency Regulations, 1951, reg. 4, provide: " (1) Any person who without lawful excuse . . . carries or has in his possession or under his control—(*a*) any firearm, without lawful authority therefor . . . shall be guilty of an offence and shall on conviction be punished with death." The evidence adduced by the prosecution in proof of the offence charged showed that, on the date and at the place named, the appellant was carrying the revolver described, and that he had no lawful authority to do so. The appellant did not seek to challenge these facts. His defence was simply that on the occasion referred to in the charge he had a lawful excuse for carrying the weapon. He gave evidence that when charged he was carrying the firearm in the course of compliance with directions contained in Government pamphlets calling upon terrorists to surrender with their arms, that he wanted to surrender the firearm to the police and had already tendered it to certain Temiars to whom he had made his first offer of surrender.

Lord MacDermott, giving the judgment of the Board, said that the defence of " lawful excuse " might be sufficiently proved although no " lawful authority " existed for doing what was charged against the accused. The terms of reg. 4 (1) clearly contemplated this and made " lawful excuse " an expression of wider import than " lawful authority." It followed that in proving " lawful excuse," it was the excuse or exculpatory reason put forward by the accused, rather than the carrying, possession or control of the firearm, that could be shown to be lawful. Secondly, it had to be noted that reg. 4 (1) did not call for any special intent on the part of the accused. The question for decision was whether the circumstances of the situation when taken in conjunction were enough to sustain a finding of " lawful excuse." While the evidence as to the contents of the Government pamphlets was meagre their lordships were of opinion that the testimony of the appellant, if accepted, went far enough to justify a finding that he was carrying the revolver on the occasion charged in the course of complying with the Government's request and because he wanted and was waiting to surrender with it to the police when they arrived and had actually tendered it to the Temiars to whom he had made his offer of surrender. Their lordships were unable to resist the conclusion that such a finding would have warranted a verdict of " lawful excuse." For these reasons their lordships had humbly advised Her Majesty that the appeal should be allowed and the conviction and sentence set aside. Appeal allowed.

Appearances: *Dingle Foot*, Q.C., *C. de Silva* and *T. O. Kellock* (*Hy. S. L. Polak & Co.*); *Melford Stevenson*, Q.C., and *D. A. Grant* (*Charles Russell & Co.*).

[Reported by J. D. Pennington, Esq., Barrister-at-Law] [3 W.L.R. 471

COURT OF APPEAL

SETTLEMENT: AFTER-ACQUIRED PROPERTY: WHETHER INCLUDED IN WILL OF TENANT FOR LIFE

***In re* Rydon's Settlement; Barclays Bank, Ltd. *v.* Everitt and Others**

Evershed, M.R., Jenkins and Hodson, L.JJ. 15th July, 1954

Appeal from Roxburgh, J.

By her marriage settlement made in 1890 a wife brought into settlement a sum of £3,000 therein defined as " the wife's trust fund," which sum was settled in common form after the death of the survivor of the husband and wife in trust for the children and remoter issue of the marriage as the wife should appoint. The settlement further provided that, until certain reversionary interests settled by the husband should fall into possession, the sum of £150 should be raised every six months out of the investments representing the £3,000 and paid to the husband. On the

falling in of the husband's reversionary interests the sums so raised were to be recouped to the wife's trust fund. The wife covenanted to convey to the trustees of the settlement after-acquired property, and it was provided that the trustees should stand possessed of such after-acquired property " upon the trusts . . . hereinbefore declared concerning money forming part of the wife's trust fund (except the special provisions hereinbefore contained as to half-yearly sales and application of the proceeds of sale thereof)." The wife, by her will, after referring to the settlement, and to the " divers trust funds and property therein and hereinafter shortly referred to as ' the wife's trust fund ' " appointed " the wife's trust fund " in favour of a granddaughter and her issue. The wife died in 1941. A reversionary interest which had been caught by the after-acquired property clause fell into possession in 1953. Roxburgh, J., held that the appointment in the wife's will was limited to the investments representing the £3,000 originally settled and that the reversionary interest devolved in default of appointment. A party interested appealed.

JENKINS, L.J., said that the question whether the wife's will operated on the interest caught by the after-acquired property clause or was confined to the original £3,000 could be divided into two: first, whether the expression " the wife's trust fund " in the settlement should comprehend both the £3,000 and later accretions; and, secondly, whether, even if that expression was not a strictly accurate description, according to the terms of the settlement, of the £3,000 and additions, nevertheless on the true construction of the will the wife had effectively exercised her power over both the original fund and the after-acquired property. Among other arguments on construction, it was contended for the respondents that the exception in the settlement providing for half-yearly sales prevented an amalgamation, as there could be no consolidation of the two funds unless their trusts were identical, and *In re Marke Wood* [1913] 2 Ch. 574 was cited. But there was no rule of law that it was impossible to have a coalescence of two funds, subject to a charge peculiar to one only; and a difference, such as that occasioned by the exception in the present case, could only throw some light on the intentions of the parties and afford some indication against an intention to consolidate the two funds; there was no reason to regard such a difference as fatal to the implication of an intention to amalgamate the two funds. On the language of the settlement it was plain that the sum to recoup the half-yearly disbursements was to form part of the wife's trust fund for all purposes. On other points of construction the contrasting views of Sargant, J., in *In re Fraser* [1913] 2 Ch. 224 and of Parker, J., in *In re Cavendish* [1912] 1 Ch. 794 had been contended for; the view of Sargant, J., was preferable; looking at the settlement as a whole, the effect of the after-acquired property clause was to bring in not only the original £3,000, but the accretion thereto. On the second question, if the construction placed on the settlement was right, the will would pass both the original fund and the after-acquired property; but if that construction was wrong, it was necessary to consider whether the will was intended to pass the whole fund. The language was inaccurate in two ways, and the problem of construction must be resolved in choosing between them; the better way was to conclude that it was intended to pass both the original fund and the after-acquired property. The appeal should be allowed.

EVERSHED, M.R., and HODSON, L.J., agreed. Appeal allowed.

APPEARANCES: *G. Cross*, Q.C., and *W. J. C. Tonge* (*Kennedy, Genese & Syson*); *D. Buckley* (*Johnson Weatherall & Sturt*); *Hubert A. Rose* (*Church, Adams, Tatham & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 480

TRADING WITH THE ENEMY: ACTION RELATING TO PRE-WAR TRANSACTIONS BY GERMANS AGAINST LONDON AGENTS: WHETHER MAINTAINABLE

Maerkle and Another *v.* British Continental Fur Co., Ltd.

Maerkle *v.* Same

Jenkins and Hodson, L.JJ. 26th July, 1954

Appeals from Wynn Parry, J.

The two plaintiffs in the first action were German nationals carrying on business at the outbreak of war in Germany. The first plaintiff in that action was the sole plaintiff in the second. In the first action the plaintiffs alleged that the defendants, as their London agents, had purchased in 1939 a number of Persian lambskins for the account of the plaintiffs for which the plaintiffs had paid. Subsequently, it was alleged that the defendants had sold the lambskins in Canada and had accounted to the Canadian Custodian of Enemy Property for $59,000, whereas the price for the skins was in fact $79,000. The plaintiffs claimed an account of all sales of the skins, damages for breach of trust, for the breach of the contract of bailment and in conversion and, further, a declaration that the defendants had not truly accounted to the Canadian Custodian of Enemy Property in respect of the sale of the skins. In the second action the plaintiff alleged that the defendants had in 1935 received moneys for the use and benefit of the plaintiff, and as trustee for him, and that the defendants in the accounts which they had rendered showed a number of payments amounting to £7,199 as having been made which, in fact, had not been made, or that the payments had been made fraudulently. The plaintiff claimed damages for conversion or breach of trust, a declaration that the defendants had converted the sum of £7,199 to their own use and an order requiring the defendants to pay that sum to the Custodian of Enemy Property in the United Kingdom. On the application of the defendants, Wynn Parry, J., made orders in both actions striking out the two statements of claim. The plaintiffs appealed.

JENKINS, L.J., said that the question was whether the subject-matter of the claims had become vested in the Custodian of Enemy Property, with the result that the actions were not maintainable. Wynn Parry, J., after considering the various statutory provisions, had held that it so vested, and that the plaintiffs' sole interest was the right to share in any distribution which the Custodian might think fit to make under the Distribution of German Enemy Property Act, 1949. The plaintiffs contended that the claims were in the nature of damages for tort and were not assignable. But the plaintiffs' rights were essentially proprietary in origin, arising out of contracts or trusts, and were caught by the legislation, especially in view of the wide definition of " property " in s. 7 (8) (*b*) of the Trading with the Enemy Act, 1939. It was also contended that, even if the plaintiffs' rights had vested in the Custodian, they were entitled to pursue the first action for the purpose of obtaining a declaration against the defendants, and *Guaranty Trust Co. of New York* v. *Hannay and Co.* [1915] 2 K.B. 536 had been relied on; that was an entirely different case from the present, and though it was authority for the proposition that in some cases a declaration might be made in the absence of a cause of action, it did not follow that one could always be made. To grant a declaration as the only relief in an action was a matter of discretion, to be sparingly exercised, and would be wrong in proceedings to which the Custodian was not a party; it might produce much embarrassment in any future proceedings there might be between the Custodian and the defendants.

HODSON, L.J., agreed. Appeals dismissed.

APPEARANCES: *Alan Campbell* (*Crawley & de Reya*); *C. A. Settle* (*Theodore Goddard & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1242

SETTLEMENT: IMPERATIVE TRUST TO DISTRIBUTE INCOME AMONG UNASCERTAINABLE CLASS: VALIDITY

Inland Revenue Commissioners *v.* Broadway Cottages Trust

Same *v.* Sunnylands Trust

Singleton, Jenkins and Hodson, L.JJ. 26th July, 1954

Appeals from Wynn Parry, J. ([1954] 1 W.L.R. 659; *ante*, p. 269).

By a settlement dated 14th July, 1950, the settlor settled a sum of £80,000 upon trust to apply the income of the trust fund during a period within the perpetuity period for the benefit of all or any of a class of beneficiaries specified in the schedule to the deed, in such shares, proportions and manner as the trustees in their absolute discretion thought fit. The specified class was admittedly unascertainable at any given time, but it was possible to determine with certainty whether any particular individual was or was not a member of this class. Two charitable bodies, members of the specified class, claimed exemption from income tax in respect of sums of money which they had received from the trustees of the settlement under the provisions relating to the trust of the income of the trust funds. Wynn Parry, J., gave judgment for the Crown. The charities appealed.

JENKINS, L.J., delivering the judgment of the court, said that the trust of the capital of the settled fund for all beneficiaries existing at the end of the appointed period must be void for

uncertainty, as there could be no division in equal shares among a class unless all the members were known; it would follow that a trust to divide the income in equal shares during the appointed period would have been equally void. The question was whether the power of selection conferred on the trustees saved the trust from uncertainty, as the trustees could always ascertain whether or not a proposed recipient was a proper beneficiary. The principle, as stated in *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522, was that, for the order to be valid, a trust must be one which the court could control and execute. The Crown had attacked the validity of the trust on several grounds. First, the court could not compel the trustees to make any distribution, as they had an uncontrolled discretion. Secondly, as the trust was for an unascertainable class, there could be no implied trust in default of distribution for all the members in equal shares, a trust which the court could have enforced. Thirdly, as the class was unascertainable, the members could not all join to demand its execution. Fourthly, the court could not control or execute the trust if called on to do so; it could only remove the trustees and appoint others. Fifthly, there was no trust in default of appointment which the court could control. Sixthly, the court could not mend the invalidity of the trust by imposing an arbitrary distribution among some only of the unascertainable class; the " relations " cases relied on by the appellants, ending with *In re Scarisbrick* [1951] Ch. 622, were *sui generis* in so much as they showed that in default of selection there was a trust for the statutory next of kin of the propositus; in the present case there could be no such contraction of the class in default of selection; with the result that the settlor had merely conferred on the trustees a revocable mandate to distribute the income, and payments made to the appellant institutions under such mandate was not the income of the institutions so as to enable them to recover the tax paid. The appellants had contended that no practical difficulty could arise in the implementation of the trust; in case of a misfeasance, the court could intervene at the suit of any member of the class, or, in the case of non-feasance, could remove the trustees and appoint others. If necessary, on the analogy of the " relations " cases, the court could declare a trust in default of distribution in favour of a modified class which could be completely ascertained; the whole scheme was practicable, and it could not be foreseen that any difficulty would arise. These contentions had an attractive air of common sense, but the submission of the Crown, that the trust was not one which the court could control, must prevail. The view of Tomlin, J., in *In re Ogden* [1933] Ch. 678, that such a trust was void for uncertainty unless the whole range of objects eligible was ascertained or capable of ascertainment was based on sound reasoning, and should be accepted. Appeals dismissed. Leave to appeal to the House of Lords.

APPEARANCES: *J. Pennycuick*, Q.C., and *P. J. Brennan* (*Boxall & Boxall*, for *Wilson & Wilson*, Kettering); *G. Cross*, Q.C., *J. H. Stamp* and *Sir Reginald Hills* (*Solicitor of Inland Revenue*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 438

BANKRUPTCY NOTICE BASED ON DAMAGES AWARDED: DAMAGES REDUCED ON APPEAL

***In re* a Debtor; *ex parte* the Debtor *v.* Scott and the Official Receiver**

Evershed, M.R., Jenkins and Hodson, L.JJ.
28th July, 1954

Appeal from the Divisional Court ([1954] 1 W.L.R. 393; *ante*, p. 127).

The Bankruptcy Act, 1914, provides by s. 4 (1): " A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—(*a*) the debt owing . . . amounts to £50, and (*b*) the debt is a liquidated sum, payable either immediately or at some certain future time . . ." By s. 5 (2): " At the hearing [of the petition] the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy. . . . " In July, 1953, a petition in bankruptcy was presented by a creditor based on the sum of £200 damages awarded to her (together with costs) in an action in the Queen's Bench Division, in which judgment had been given on 17th March, 1953. A bankruptcy notice had been issued on 16th April, based on the damages alone. The time for compliance with the notice was extended to 3rd July. On 17th July, the taxing master issued his certificate. The taxed costs amounted to £226. The petition was filed on 28th July, alleging a debt of £426. The hearing of the petition was, on 21st October, 1953, adjourned pending the hearing of an appeal in the action. On 22nd October, 1953, the Court of Appeal reduced the damages to £25 and allowed the debtor to set off one-half of his costs in the Court of Appeal against the judgment against him in the court below. On 27th November, 1953, the petition was restored and a receiving order was made against the debtor. The debtor appealed to the Divisional Court in Bankruptcy, on the grounds that the reduction by the Court of Appeal of the sum of £200 to £25 left a figure which was not a correct figure for bankruptcy proceedings, and that the registrar in the county court had wrongly proceeded with the hearing of the petition, as he did not know at what figure the costs awarded to the debtor, which had not then been taxed, ranked. The Divisional Court dismissed the appeal.

EVERSHED, M.R., said that, in the court below, the debtor had taken two points: first, that the order of the Court of Appeal in reducing the damages to £25 and in providing a set-off extinguished the original debt which was the foundation of the act of bankruptcy; secondly, that where, after a bankruptcy notice was served for a large sum, and was followed by a petition admitting that the sum was much smaller, there was an injustice, and the court in its discretion ought to refuse to make a receiving order. Both these contentions had been rejected, and rightly. But there was now another point which had not been taken below, that the petitioning creditor must establish that the debt on which his petition was founded was presently payable and available to him at the date of the act of bankruptcy, though he need not show that non-payment of the whole debt constituted the act of bankruptcy alleged. The statutory requirements that the petitioning creditor's debt must be proved to be existing and to have the quality mentioned in s. 4 (1), both at the date of presenting the petition and at the date of the hearing, had been satisfied in the present case. But there was a further requirement which emerged from what was called the common law of bankruptcy; that was, that the petitioning creditor's debt must also be shown to have existed and to have the quality required by s. 4 (1) at the date of the act of bankruptcy as well as the date of the presentation and hearing of the petition; that emerged from *In re Debtors* [1927] 1 Ch. 19. On 3rd July, the date of the act of bankruptcy, it could not be said of the costs of the action that they constituted a liquidated debt presently payable, as they had not been certified. Accordingly, the debtor was entitled to succeed, and the receiving order should be discharged.

JENKINS and HODSON, L.JJ., agreed. Appeal allowed.

APPEARANCES: *Muir Hunter* (*John T. Lewis & Woods*); *M. Corley* (*Piesse & Sons*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1190

EXECUTION: WRONGFUL EVICTION OF TENANT: WHETHER SHERIFF'S OFFICER LANDLORDS' AGENT

Barclays Bank, Ltd. *v.* Roberts

Evershed, M.R., Jenkins and Hodson, L.JJ.
30th July, 1954

Appeal from Marylebone County Court.

The proprietors of a house within the Rent Acts obtained a writ of possession of the premises. One of several occupiers refused to leave the premises, alleging that he was a lawful sub-tenant for the purposes of the Acts, and he notified both the proprietors and the sheriff's officers of his contention. The sheriff's officers were advised by the solicitors acting for the proprietors that the sub-tenancy was unlawful and that they should continue with the ejectment. Accordingly they executed the writ and evicted the sub-tenant. On the same day the sub-tenant applied for an injunction, obtained a stay of execution, and was permitted to re-enter the premises on the afternoon of the day on which he had been evicted. He obtained leave to defend in the original action against the tenant and he counter-claimed for damages for wrongful eviction. The action against him was dismissed on the proprietors' admission that the sub-letting was lawful, but his counter-claim was dismissed. The sub-tenant appealed against the dismissal of the counter-claim.

EVERSHED, M.R., said that, with some hesitation, he agreed with the county court judge that the case was covered by *Williams* v. *Williams* [1937] 2 All E.R. 559. In that case it was said to be well established that sheriff's officers, executing a judgment of the court, were acting on behalf of the court as its officers and not as servants or agents of the plaintiff who had recovered judgment; there might, of course, be circumstances which showed that the landlord by his intervention had

made the sheriff his agent to do something not covered by the judgment or the writ of execution, but there were no such circumstances, so that the landlord, who had not interfered, and the sheriff's officers, who had merely executed the judgment, were entitled to succeed on appeal. In the present case, although the sheriff's officers did consult the landlord's solicitors, it could not be said that they departed, at the landlord's instance, from the terms of the writ of execution; the responsibility for acting on the advice was theirs, and there was nothing to show that they held the landlord responsible for their actions. Whether, in a case in which they received notice that the tenant was protected by the Rent Acts but nevertheless evicted him, they would be protected by *Williams* v. *Williams, supra*, was a point unnecessary for decision in the present case. There was a further matter of general significance. The terms of Ord. 47, r. 1, reflected the state of the law before the Rent Acts, when the forfeiture of a lease automatically put an end to the rights of all occupiers derived out of the lease, unless they applied to the court for relief from forfeiture. It was, however, fundamental under the Rent Acts that no order for possession could be made against protected tenants, save in accordance with the conditions laid down in the Acts. It was, therefore, desirable that the terms of the rule should be reviewed by the appropriate authority.

JENKINS and HODSON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *C. L. Collymore* (*Alban P. B. Gould*); *L. Jellinek* (*Wainwright & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1212

CHANCERY DIVISION

BANKRUPTCY: ATTACHMENT OF DEBT NOT COMPLETED BY CONDITIONAL ORDER FOR PAYMENT TO CREDITOR'S SOLICITORS: CHARACTER OF DEBT NOT ALTERED BY JUDGMENT

***In re* Lupkovics; *ex parte* the Trustee *v.* Freville**

Upjohn, J. 8th February, 1954

Motion.

The Bankruptcy Act, 1914, provides by s. 40: "(1) Where a creditor . . . has attached any debt due to him, he shall not be entitled to retain the benefit of the . . . attachment against the trustee in bankruptcy of the debtor unless he has completed the . . . attachment before the date of the receiving order . . . (2) . . . an attachment of the debt is completed by receipt of the debt . . ." The Crown Proceedings Act, 1947, provides by s. 27 (1): "Where any money is payable by the Crown to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt . . . the High Court may . . . make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person . . ." In 1948 and 1950 a wife advanced sums of money to her husband, a doctor, for the purposes of his practice. In July, 1952, judgment was entered for her against him for £5,500 and costs. Under the National Health Service Act, 1946, £2,786 was due to the husband from the Ministry of Health. On the wife's seeking, in the Queen's Bench Division, pursuant to s. 27 (1) of the Crown Proceedings Act, 1947, an order that it be paid to her, the master in October, 1952, ordered that £2,786, less seven guineas being the amount of the Ministry's costs, be paid, on the terms that the £2,786 be retained by the wife's solicitors for six months from 31st October, 1952, they undertaking to indemnify the Ministry for that period against any claim in respect of that sum by a trustee in bankruptcy of the husband. Accordingly, £2,778 (being £2,786 less the costs) was paid to the wife's solicitors. On 2nd January, 1953, a bankruptcy petition was presented, and on 4th March a receiving order made, against the husband. The husband's trustee in bankruptcy claimed that the sums which the wife had advanced to him were gifts and not loans: alternatively, that, under s. 40 of the Bankruptcy Act, 1914, she was not entitled to retain against the trustee the benefit of the attachment of the debt of £2,786 due from the Ministry of Health, as the attachment was not completed at the date of the bankruptcy.

UPJOHN, J., said that, on the evidence, the advances by the wife were loans and not gifts. The trustee contended that the attachment of the debt due from the Ministry was not completed before the date of the receiving order, as there had been no "receipt" within s. 40 (2). It was plain that the arrangement was that she was to be paid £2,778, but that that sum was to remain with the solicitors for six months as security for any claim which might be made against the Ministry by a possible trustee in bankruptcy. The true view was, that there was no receipt of the debt until there had been an unconditional payment to the judgment creditor or her agents; there had been a payment to the agents, but they held the money not solely as her agents but as stakeholders or trustees for the protection of the Ministry of Health; if the money had been paid into court, *George* v. *Tompson's Trustee* [1949] Ch. 322 would have been directly in point. There was no receipt while the money remained in the solicitors' hands under the terms of the order. It had been contended for the wife that the proceedings with the Ministry were not by way of attachment at all. Attachment was not defined in the Bankruptcy Act, and was not a term of art confined to attachments arising under Ord. 45; proceedings under s. 27 (1) of the Crown Proceedings Act, 1947, were proceedings by way of attachment for the purposes of s. 40. Accordingly the money must be paid to the trustee. The wife finally contended that, although she was originally deferred to other creditors by s. 36 (2) as the sums were advanced for business purposes, that position had been altered by the judgment of July, 1952 (*In re Slade* [1921] 1 Ch. 160); but in that case there had been a complete change in the nature of the debtor's obligation; that was not so in the present case; the wife merely became a judgment creditor in respect of the original debt; it was well settled that there was no merger of original debt and judgment debt, and that the trustee was entitled to investigate the nature of the debt (*In re Van Laun* [1907] 2 K.B. 23). The wife's claim must accordingly be deferred to the claims of other creditors.

Order accordingly.

APPEARANCES: *J. G. K. Sheldon* (*Wedlake, Letts & Birds*); *Diplock*, Q.C., and *N. MacDermot* (*Field, Roscoe & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1234

PROFITS TAX: NATIONALISED INDUSTRY: COMPENSATION: INTERIM INCOME PAYMENTS

Inland Revenue Commissioners *v.* Butterley Co., Ltd.

Roxburgh, J. 27th July, 1954

Appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

By s. 19 (1) of the Coal Industry (Nationalisation) Act, 1946, compensation on the transferred assets was "due on the primary vesting date [1st January, 1947], subject to determination of the amount . . ." Section 19 (2) and s. 22 provided a right to "interim income" or to "revenue payments" for the period between "the primary vesting date and the date on which any such compensation is fully satisfied. . . ." Payments were to be calculated for the years 1947 and 1948 under s. 22 (3) of the Act and for the year 1949 under s. 1 (2) of the Coal Industry (No. 2) Act, 1949, payments under both these heads being termed "revenue payments"; payments made subsequently to these years were to be calculated in accordance with s. 22 (2) of the Act of 1946 and were called interim payments. Paragraph 7 of Sched. IV to the Finance Act, 1937, as amended by s. 32 (1) of the Finance Act, 1947, provided: "Income received from investments or other property shall be included in the profits . . ." for the purposes of profits tax. The respondent company carried on a number of businesses, including a colliery undertaking. On 1st January, 1947, the assets of their colliery trade vested in the National Coal Board under the Act of 1946; and during the years 1947–50 they received "interim income" or "revenue" payments under s. 19 (2) calculated in accordance with s. 22 (2) and (3) of the Act of 1946 and s. 1 (2) of the Act of 1949. These sums were included in the computation of their profits for the purposes of their assessments to profits tax. The Special Commissioners discharged the assessments so far as these sums were included. The Crown appealed from that decision.

ROXBURGH, J., said that the Crown had contended before the Commissioners that the payments were part of the profits of the trade or business carried on by the company in the chargeable accounting periods commencing 1st January, 1947, and ending on 31st December, 1950. But the company contended that the payments were not part of the profits of the trade or business carried on by the company during the relevant chargeable accounting periods, but arose to it from its colliery concern, which trade ceased entirely on 1st January, 1947. In the view that he took of this case, it was not necessary to determine whether the finding of the Commissioners, which was in favour

of the company on this point, was well founded or not. He left it entirely at large, because he could see no escape from the alternative argument of the Crown that the revenue payments and interim income payments were on the true construction of para. 7 (1) of Sched. IV to the Finance Act, 1937, as amended by s. 32 (1) of the Finance Act, 1947, " income received from investments or other property." The company's right to compensation, which was due but payment of which was deferred, was a chose in action and none the less so because it was the creature of statute, and the interim income and revenue payments which arose from that right were " income received from . . . other property " within the meaning of para. 7, and should therefore be included in the profits of the company for the purposes of profits tax. Appeal allowed; assessment referred to Commissioners for adjustment.

APPEARANCES: *Sir Reginald Manningham-Buller*, Q.C., S.-G., and *Sir Reginald Hills* (*Solicitor of Inland Revenue*); *John Senter*, Q.C., and *Desmond C. Miller* (*Thicknesse & Hull*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 1199

REVENUE: ESTATE DUTY: SETTLEMENT IN FAVOUR OF PERSONS OTHER THAN RELATIVES: LIABILITY TO ESTATE DUTY

***In re* Leven and Melville (Earl) decd.; Inland Revenue Commissioners *v.* Williams Deacon's Bank, Ltd., and Others**

Wynn Parry, J. 30th July, 1954

Action.

By cl. 3 of his will made in 1909, the then Earl of Leven (hereinafter called " the testator ") devised his *K* estate to the use of his brother *A* and his assigns during his life with remainder to the use of his first and every other son successively in tail male with remainder to the use likewise of his brother *D* with remainder to the use likewise of his brother *I* with remainder " to the use of the person who at the time of the failure or determination of the preceding uses and when this present ultimate limitation shall take effect in possession shall be or become entitled to the title and dignity of the Earldom of Leven and his heirs and assigns absolutely." By cl. 5 he constituted a settled legacy of £200,000 on trust to hold it during the period specified to pay the income to the earl for the time being and at the end thereof for the then earl. By cl. 8—a forfeiture clause—he made each brother and any of their sons born in his lifetime provide for death duties by taking out insurance policies and assigning them to the trustees of the will. In 1913 the testator died. *A* (hereinafter called " the earl ") succeeded him and took out on his own life and in the trustees' names policies of insurance for £150,000. By deed executed in 1914 between the trustees and the earl, the earl covenanted to do nothing whereby the policies might become void or voidable, and not to hinder the trustees from receiving policy moneys; to effect a new one or new ones should any become void; and duly to pay the premiums; and he irrevocably authorised the trustees to pay them out of the income of the settled legacy and charged that income with their payment. In June, 1942—the *K* estate having been sold and the proceeds of sale invested—the court authorised the acceptance of an offer by the insurance company to convert the policies into fully paid whole-life policies totalling £172,566 and ordered the earl to covenant with the trustees that on his death his estate should bear all duty then payable in respect of the proceeds of sale. By deed executed in July, 1942, the earl did so covenant. In 1945 he and his eldest son barred the entail. In 1947 the earl died and estate duty became payable in respect of his interest in the property settled by the testator's will. Duty amounting to £68,384 13s. 2d. was paid out of the earl's free estate. The Crown claimed a declaration that, having regard to s. 44 of the Finance Act, 1940, and s. 7 (1) of the Finance Act, 1894, in determining the value of the earl's estate for assessment to estate duty no allowance was to be made for that debt. The Finance Act, 1894, provides by s. 7 (1) that in determining the value of an estate for estate duty, an allowance shall not be made for incumbrances created by the deceased, unless created *bona fide* for full consideration. The Finance Act, 1940, provides by s. 44 (1) that where the deceased has made a disposition of property in favour of a relative of his, the creation or disposition in favour of the deceased of an annuity shall not be treated as consideration for the purposes of s. 7 (1) of the Act of 1894; by subs. (2) " relative " means wife, husband, father, mother, children, uncles, aunts, or their issue or spouses.

WYNN PARRY, J., said that it was agreed that the deed of 1914 was a " disposition of property." The first question was whether the effect of the disposition was to be determined at the date of the disposition or of death; the former must be correct, as the choice of any other date would lead to great uncertainty and confusion. Taking the date as 1914, the disposition was not such that only a relative could have benefited, as if the ultimate limitation under cl. 3 of the will took effect a person not a relative would benefit; where the class to take included persons other than relatives, and the person who would actually benefit was not ascertainable at the date of the disposition, s. 44 was inapplicable. That disposed of the action, but a further point had been argued for the Crown, that there had been the creation or disposition of an annuity in favour of the deceased. The premium payments did constitute an " annuity " within the meaning of the Act, but had been extinguished by the acceptance of the insurance company's offer under the court order, and it was argued that " disposition " included " extinguishment "; but the primary meaning of the word was a dealing with property which remained in existence, and that meaning was reinforced by ss. 45 (2) and 59 of the 1940 Act; " disposition " did not, in its context, include extinguishment. Action dismissed.

APPEARANCES: *G. Cross*, Q.C., and *J. H. Stamp* (*Solicitor of Inland Revenue*); *Sir Andrew Clark*, Q.C., and *E. I. Goulding* (*Lee & Pembertons*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1228

INCOME TAX: EXCESS PROFITS TAX: DISCONTINUANCE OF TRADE: GRATUITOUS PAYMENT FOR WORK DONE

Severne (Inspector of Taxes) *v.* Dadswell

Inland Revenue Commissioners *v.* Same

Roxburgh, J. 30th July, 1954

Appeals from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent taxpayer was a miller who had ceased to mill flour in 1929. In 1941 he wished to start milling again, and obtained a licence from the Ministry of Food (who controlled the whole flour industry at that time) entitling him to mill flour. As a licensed miller he was entitled to receive rebates based on the flour which he milled; but as he had not been a miller at the outbreak of the war he was not entitled to remuneration under the agreement made between the British Millers' Mutual Pool, Ltd. and the Ministry, by which any pool miller was entitled to compensation for a loss suffered under the system of rebates. By a letter dated 27th October, 1942, his accountant was told by the Ministry that the respondent would probably be required to furnish accounts on lines similar to the remuneration agreement forms used by the pool millers. On 28th December, 1943, the accountant was informed by the Ministry that the basis on which millers, who had commenced milling during the period of control, would be remunerated was under consideration. On 27th October, 1944, and 11th May, 1945, his accountant was informed that no decision had been reached, but that the matter was still under consideration. On 30th September, 1945, the respondent ceased to trade. On 6th September, 1946, his accountant was required to furnish accounts in respect of the respondent's flour milling activities because the " remuneration " was under consideration. In 1949 the respondent received the sum of £3,289 from the Ministry as " remuneration." This sum was included in the profits for the relevant years in his assessments for income tax under Sched. D and for excess profits tax. The Special Commissioners discharged the assessments on the ground that it was not a trading receipt. The Crown appealed from their decision.

ROXBURGH, J., said that a study of the cases had convinced him that the relevant question was whether any work had been done in the course of trade in respect of which the reward had not been finally settled, or, in other words, anything outstanding in the nature of, or analogous to, a book debt. He had been referred first to *Isaac Holden & Sons, Ltd.* v. *Inland Revenue Commissioners* (1924), 12 T.C. 768. This decision and the reasoning on which it was based had been accepted and explained in a number of later cases of high authority. He preferred the explanation of Lord Greene, M.R., in *Johnson* v. *W. S. Try, Ltd.* (1946), 62 T.L.R. 355, who said: " . . . The circumstance that the amount of remuneration was only fixed at a later date does not alter the fact that the remuneration was in respect of trading operations of the earliest year." Alternatively he would prefer the explanation given in *British Mexican Petroleum Co., Ltd.*

v. *Inland Revenue Commissioners* (1932), 16 T.C. 570. Authority established the proposition that if it could be said at the moment of discontinuance that the payment for some work already done had not been finally settled, even though there was no legal claim for any more, then if a further payment was made afterwards, although wholly gratuitous, the account could be reopened so as to let in what was analogous to a trade debt at the figure actually received. If, on the other hand, the item was not analogous to a trade debt, or if there had been a final settlement, the account had been finally closed. This must be a question of fact, and in the circumstances he had no hesitation in holding that for the work in question payment had not been finally settled on 30th September, 1945, when the respondent ceased to trade. Accordingly he would allow the appeals with costs and the £3,289 must be brought into the reopened accounts and the assessments restored in respect of the income tax and excess profits tax. Appeals allowed.

APPEARANCES: *F. Heyworth Talbot*, Q.C., and *Sir Reginald Hills* (*Solicitor of Inland Revenue*); *R. E. Borneman*, Q.C., and *C. N. Beattie* (*Bridgman & Co.*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 1204

QUEEN'S BENCH DIVISION

DAMAGES: SALE OF GOODS: GOODS UNSALEABLE WHEN BUYERS ACQUIRED KNOWLEDGE OF BREACH: MEASURE OF DAMAGES

Kwei Tek Chao and Others *v.* British Traders and Shippers, Ltd.; N.V. Handelsmaatschappij J. Smits Import-Export, Third Party

Devlin, J. 27th July, 1954

Action.

London exporters, the sellers under a c.i.f. contract made in August, 1951, for the sale of 20 tons of Rongalite to Hongkong merchants, at a price of £590 a ton, for shipment to Hongkong by 31st October, 1951, latest, on 10th December, 1951, presented to the buyers' bank bills of lading purporting to show that the goods had been shipped from Antwerp on the contract date. They received payment of £11,800, the price agreed under the contract. In fact, the bills of lading had, without the knowledge of the sellers, been forged by the third party, the sellers' shipping agents being privy to the forgery, and the goods had not been shipped until 3rd November, 1951. The buyers knew before the ship arrived on 10th December that the date of shipment, as indicated by the bills of lading, was false, but, nevertheless, they took delivery of the goods, retaining them in a godown in Hongkong. Owing to the late shipment of the goods the buyers lost a contract for resale. An embargo placed by the Chinese authorities on the importation of Rongalite from Hongkong resulted in such a serious fall in the market price that Rongalite became virtually unsaleable in Hongkong. In February, 1952, the buyers discovered that the bills of lading had been forged and sued the sellers for the return of the price, alternatively for damages for breach of contract. Devlin, J., on 1st February, 1954 ([1954] 2 W.L.R. 365; *ante*, p. 163), held that the buyers' claim for the return of the price failed, but that they were entitled to succeed on their claim for damages for the breach of contract committed by the sellers in delivering forged bills of lading which had caused the buyers to lose their right to reject which they could have exercised had they known from the bills of lading the true date of shipment. He held that the measure of damages was the difference between the contract price and the market price and postponed consideration of the application of the measure of damage for further argument.

DEVLIN, J., said that the principle on which damages were to be assessed was that laid down in *James Finlay & Co.* v. *N. V. Kwik Hoo Tong* [1929] 1 K.B. 400, based on the words of Wright, J., at first instance ([1928] 2 K.B. 604, at p. 613), when he said that the principle fell directly within the language of s. 53 (2) of the Sale of Goods Act, 1893. The date on which the buyers knew or ought to have known that they had a right to reject was 17th December, when the goods arrived. The buyers were entitled to be put in the same position as if they had then rejected the goods. Their reasonable course, to mitigate their damages, was to sell the goods then for what they would fetch and to obtain from the seller the difference between the price obtained and the contract price, and the price obtained was either the price actually obtained or the price which would have been obtained on a sale. The sellers contended that the true measure was the difference between the contract price and the market price at 10th November, when the documents were tendered and the right to reject arose. That submission was fallacious, as 10th November was not the relevant date; the breach was the failure to give in the bills of lading correct information about the date of shipment; the sellers had, unwittingly, deceived the buyers and could not expect the buyers, as reasonable men, to act as if they had not been deceived and to make a notional purchase in the market accordingly. The relevant date was not that of the breach, but that on which the buyers, acting with knowledge of their rights and reasonable diligence, could have resold the goods for what they would fetch. A second fallacy was that it was not the buying price, but the selling price, which was applicable; the buyers held the goods and could not be expected notionally to buy again; they wanted to sell and the difficulty was to fix the selling price on 17th December. There was then no market, but there was some evidence of a sale at that date at £70 per ton. The damages would accordingly be £520 per ton. Judgment for the buyers against the sellers, and for the sellers against the third party.

APPEARANCES: *A. Lincoln*, Q.C., and *George Webber* (*A. Kramer and Co.*); *E. Roskill*, Q.C., and *G. G. Honeyman* (*Constant and Constant*); *M. Kerr* (*Middleton, Lewis & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 496

CONTRACT: NEGLIGENCE: CONDITION EXEMPTING SHIPOWNERS FROM LIABILITY FOR INJURY TO PASSENGERS: SHIPOWNERS' SERVANTS

Adler *v.* Dickson and Another

Pilcher, J. 30th July, 1954

Preliminary point of law.

A sailing ticket issued to the plaintiff by a shipping company for a Mediterranean cruise contained (*inter alia*) the following conditions: "passengers . . . are carried at passengers' entire risk" and "the company will not be responsible for and shall be exempt from all liability in respect of any . . . injury whatsoever of or to the person of any passenger . . . whether the same shall arise from or be occasioned by the negligence of the company's servants . . . in the discharge of their duties, or whether by the negligence of other persons directly or indirectly in the employment or service of the company, . . . under any circumstances whatsoever . . ." The plaintiff, who was injured when mounting the gangway of the ship, brought an action in negligence against the master and boatswain of the ship. The question whether the defendants were entitled to the protection admittedly afforded to the company by the conditions of the ticket was argued as a preliminary point.

PILCHER, J., said that it must be assumed that the plaintiff's injuries were due to the defendants' negligence in the performance of their duties on the ship. The point at issue had not been previously decided, though it was established by authority that in appropriate circumstances agents concerned in the carriage of goods were entitled to claim the benefit of exception clauses in the contract of carriage between their principal and the goods owner. In *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co., Ltd.* [1924] A.C. 522, the plaintiffs' goods had been damaged by bad stowage in a ship which was under charter; the defendant shipowners were not parties to the bills of lading which contained an exception clause. The House of Lords held that the defendants were protected, but differed in their reasons. Lord Sumner expressed the view that they were not liable because they took the goods on an implied bailment in the terms of the bill of lading. Scrutton, L.J., whose dissenting judgment below was upheld by the House, later explained the case in *Mersey Shipping & Transport Co., Ltd.* v. *Rea, Ltd.* (1925), 21 Ll. L.R. 375, by saying that the reasoning of the House showed that where there was an exception clause, servants or agents acting under the contract could rely on it. If that widely stated proposition was correct, it was conceded that the present plaintiff must fail. But the notion of an implied bailment was inappropriate to a case of personal injuries to a passenger. The defendants contended that they were entitled to exemption because (1) the acts of negligence occurred while they were carrying out their normal duties; (2) the employers were acting as their agents in inserting the exception clause in the contract; and (3) the plaintiff impliedly agreed to travel at her own risk. Notwithstanding the *Elder Dempster* case and other cases dealing with freight, there was no reason to assume that the P. & O., the defendants' employers, had any intention, when inserting the

exception clause in a passenger's ticket, to act as their servants' agents. There was no reason for such an assumption, and there was every reason against it. Business efficiency did not require the implication of such a term as the defendants contended for. Accordingly, the point of law would be decided in favour of the plaintiff. Judgment for the plaintiff.

APPEARANCES: *J. G. Le Quesne* (*Neil Maclean & Co.*); *M. Kerr* (*Ince, Roscoe, Wilson & Griggs*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 450

PROBATE, DIVORCE AND ADMIRALTY DIVISION

COSTS: TAXATION: FATAL ACCIDENTS ACTS

Thomason *v.* Swan Hunter & Wigham Richardson, Ltd.; *The Albion (No. 2)*

Willmer, J. 21st July, 1954

Summons.

The Supreme Court of Judicature (Consolidation) Act, 1925, provides by s. 50: "Subject to the provisions of this Act and to rules of court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid." R.S.C., Ord. 22, r. 14, para. (11), provides: "The costs of the plaintiff . . . shall be taxed . . . as between party and party and as between solicitor and client, and the taxing master . . . shall certify the respective amounts of the party and party and solicitor and client costs, and the difference (if any) . . . and no costs other than those so certified shall be payable to the solicitor for any plaintiff in the cause or matter." The plaintiff, a widow, whose husband lost his life while serving as a seaman on board the steamship *Maystone* when in collision with the aircraft carrier *Albion* in 1949, sued the defendants under the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix of her husband's estate in respect of the husband's death. The defendants admitted liability and the parties arrived at a settlement. On the question of costs, the plaintiff applied for an order that the defendants should pay the plaintiff's costs in the action to be taxed as between solicitor and client. The application was heard in chambers and adjourned into court for judgment.

WILLMER, J., said that there was no clear authority on the matter of the general power of the court to award costs as between solicitor and client; the matter had been canvassed and varying *dicta* pronounced in *Mordue* v. *Palmer* (1870), L.R. 6 Ch. 22, *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449, and *Andrews* v. *Barnes* (1888), 39 Ch. D. 133. It was stated in Halsbury's Laws of England, 2nd ed., vol. 26, at p. 101, that there was no general power to award costs as between solicitor and client, though they might be awarded in equity matters, cases where there was express statutory power and where there was an obligation to indemnify or contribute. The words of s. 50 of the Act of 1925 would *prima facie* enable the court in a proper case to award such costs, but they were subject to the provisions of the Act and rules. An obvious limitation was in Ord. 65, r. 27 (29), which directed the taxing master to disallow as between the parties costs incurred or increased through over-caution, negligence or mistake; that would prevent the court from making an order for costs as between solicitor and own client, though not as between solicitor and client. But the present case, brought under the Fatal Accidents Acts, was in a special class, and the special code set out in Ord. 22, r. 14, applied. By para. (4) of that rule, the court might give directions as to payment to the plaintiff's solicitor in respect of costs or of the difference between party and party and solicitor and client costs. Neither that paragraph, nor para. (11), could be complied with by the registrar on taxation if the court awarded solicitor and client costs. The conclusion was, that in cases under the Fatal Accidents Acts, the discretion of the court under s. 50 was limited by the rules, and that in the absence of consent there was no power to direct payment by the defendant of costs to be taxed otherwise than as between party and party. The plaintiff's costs would accordingly be taxed as required by r. 14 (11). Order accordingly.

APPEARANCES: *Richard Vick* (*Neil MacLean & Co.*); *D. H. Hene* (*Bentleys, Stokes & Lowless*, for *William Mark Pybus & Sons*, Newcastle-on-Tyne).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1220

DIVORCE: INSANITY: DETENTION IN PURSUANCE OF AN ORDER

Bithell *v.* Bithell (by her Guardian)

Lord Merriman, P. 19th July, 1954

Petition tried at Manchester Assizes.

The Matrimonial Causes Act, 1950, provides by s. 1 (2): "A person of unsound mind shall be deemed to be under care and treatment (*a*) while he is detained in pursuance of any order . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . . (*d*) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930 . . . being treatment which follows without any interval a period during which he was detained as mentioned in para. (*a*) . . . of this subsection . . ." On 7th March, 1947, a wife was received into a mental hospital as a temporary patient under s. 5 of the Mental Treatment Act, 1930. On 8th March, 1947, she was visited, in compliance with s. 5 (*a*) of the Act, by two members of the visiting committee who made an entry in the minute book in the superintendent's possession that they were satisfied that she should be detained. During the last twenty-eight days of her six months' detention as a temporary patient she was examined by the medical superintendent who formed the opinion that she had recovered her volition sufficiently to agree to remain as a voluntary patient. Accordingly, on 6th September, 1947, she was discharged as a temporary patient and simultaneously admitted as a voluntary patient and remained as such up to the date of her husband's petition praying for a divorce on the ground that the wife was incurably of unsound mind and had been "continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition," within s. 1 of the Matrimonial Causes Act, 1950.

LORD MERRIMAN, P., said that the question was whether the entry made by the members of the visiting committee constituted an "order" within the meaning of s. 1 (2) of the Act of 1950. The Mental Treatment Act, 1930, provided in s. 5 a number of safeguards for the patient. In *Benson* v. *Benson* [1941] P. 90 it was held that a direction by the board of control under subs. (13) for an extension of the period of six months was an "order" within the terms of the Act then applicable. Taking into consideration the provisions of the section, it appeared that the affirmative opinion of the visitors was a lawful sanction for the continuation of the detention for six months; from the moment when they certified in the appropriate book that they were satisfied that the wife should continue to be detained, she was detained under an order. It followed that paras. (*a*) and (*d*) of s. 1 (2) were satisfied, and that the husband was entitled to a decree. Decree *nisi*.

APPEARANCES: *A. M. Knight* (*Skelton & Rust*, for *Wall, Johnson and Hopwood Sayer*, Wigan); *W. J. Moore* (*Official Solicitor*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 463

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Companies Liquidation Account (Interest) Order, 1954. (S.I. 1954 No. 1088.)

Food Standards (Soft Drinks) (Amendment) Order, 1954. (S.I. 1954 No. 1089.)

Friendly Societies (Date of Repeal of Enactments) Order, 1954. (S.I. 1954 No. 1094.)

Housing (Repairs Increase) (Scotland) Regulations, 1954. (S.I. 1954 No. 1082 (S. 105).) 11d.

Import Duties (Exemptions) (No. 6) Order, 1954. (S.I. 1954 No. 1093.) 5d.

Petty Sessional Divisions (Shropshire) (No. 2) Order, 1954. (S.I. 1954 No. 1090.) 6d.

Rent Restrictions (Scotland) Amendment Regulations, 1954. (S.I. 1954 No. 1081 (S. 104).) 5d.

Safeguarding of Industries (Exemption) (No. 8) Order, 1954. (S.I. 1954 No. 1086.) 6d.

Smallholdings (Contributions Towards Losses) Supplemental Regulations, 1954. (S.I. 1954 No. 1087.)

Stromness Harbour Order, 1954. (S.I. 1954 No. 1083 (S. 106).) 6d.

Wages Regulation (Unlicensed Place of Refreshment) (Amendment) Order, 1954. (S.I. 1954 No. 1079.) 8d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

NOTES AND NEWS

Honours and Appointments

Mr. JOHN OWEN HUNT, Deputy Clerk of Shipley Urban District Council since 1946, has been appointed Clerk of Matlock Urban District Council, as from 1st October.

Mr. G. E. JOHNSTONE, B.C.L., has been appointed Legal Adviser to the Ministry of Food in succession to Mr. J. R. Hood, C.B.E., who has retired after holding the position since 1946.

Mr. FRANK MILLS, solicitor, of Huddersfield, has been appointed Deputy Coroner of Huddersfield, in succession to Mr. Thomas Arnold Steel Drake, Deputy Coroner for the past three years, who has resigned for business reasons.

The grant of the Freedom of the City of London was recently approved for: Mr. C. J. CLEUGH, solicitor's articled clerk, of Bourne End, Bucks; Mr. KENNETH OLIVER GEORGE HUNTLEY, solicitor, of London, E.C.1; Mr. WILLIAM ALEXANDER LAVENDER, solicitor, of the Strand, W.C.2; Mr. JOHN EYRE NORTON, solicitor, of London, E.C.2, and Mr. ERIC ARTHUR SCUDAMORE, solicitor, of Weston-super-Mare.

Personal Notes

Mr. Elwyn Davies, LL.B., solicitor, of Blaenau-Festiniog, was married recently to Miss Alwena Davies, of Blaenau-Festiniog.

Mr. Francis Robert Kidd, solicitor, was married on 14th August to Miss Norma Williams, of Leicester.

Miscellaneous

COUNTY BOROUGH OF IPSWICH DEVELOPMENT PLAN

On 3rd August, 1954, the Minister of Housing and Local Government approved with modifications the above development plan. A certified copy of the plan as approved by the Minister has been deposited at the Town Clerk's Office, Town Hall, Ipswich, and will be open for inspection free of charge by all persons interested between 9 a.m. and 1 p.m. and between 2.30 p.m. and 5.30 p.m. from Monday to Friday and between 9 a.m. and 12 p.m. on Saturdays. The plan became operative as from 17th August, 1954, and if any person aggrieved by the plan desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan he may within six weeks from 17th August, 1954, make application to the High Court.

DOUBLE TAXATION: GERMANY

A Double Taxation Convention between the United Kingdom and the Federal Republic of Germany was signed in London on 18th August. The Convention, which is subject to ratification, provides for the avoidance of double taxation on income and profits, and is expressed to take effect in the United Kingdom from 6th April, 1953. It is, in general, similar to those already made with France and other European countries. The full text will be published shortly by H.M. Stationery Office.

AUSTRIA: REPAYMENT OF PRE-WAR LIABILITIES

Austrians will now be able to pay their pre-war liabilities to United Kingdom creditors in sterling as a result of arrangements made between H.M. Government and the Austrian Government. The arrangements supplement the Austrian Money and Property Agreement of 1952 (published in Cmd. 8608) and provide that, after obtaining foreign exchange licences for the purchase and remittance of sterling, Austrian natural and juridical persons can obtain the required amount of sterling either direct from the Austrian National Bank or through a foreign exchange dealer.

A Votive Mass of the Holy Ghost (The Red Mass) will be celebrated in Westminster Cathedral on Friday, 1st October, 1954 (opening of the Michaelmas Law Term), at 11.30 a.m., in the presence of His Eminence Cardinal Griffin, Archbishop of Westminster. The celebrant will be the Rt. Reverend Monsignor Charles L. H. Duchemin. Counsel will robe in the Chapter Room at the Cathedral. The seats behind counsel will be reserved for solicitors. Will those desirous of attending please inform the Hon. Secretary, Society of Our Lady of Good Counsel, 6 Maiden Lane, W.C.2, so that an adequate number of seats may be reserved.

Wills and Bequests

Sir William F. Ascroft, retired solicitor, of Preston, left £174,671.

Mr. J. A. Brain, solicitor, of Reading, left £36,226 (£35,168 net).

SOCIETIES

The SOLICITORS' ARTICLED CLERKS' SOCIETY announce the following programme:—

Sunday, 5th September, River Outing. Tuesday, 14th, Theatre Party: Full details from Michael Coles, CEN. 5718, day only. Thursday, 16th, Debating Club A.G.M.: Business: To adopt Club Constitution, and Rules of Debate. Law Society's Hall, 6 p.m. for 7 p.m. Wednesday, 22nd, Non-Members' Tea Party: All articled clerks who are not members of the Society are invited to this function at which they will have an opportunity of finding out details regarding the Society and of putting questions concerning the profession to a panel of experts. Law Society's Hall. Members, 6 p.m. for 7 p.m. Friday, 1st October, Autumn Dance: A dance will be held at the Royal Empire Society (Craven Street entrance), from 7.30 p.m. to midnight. Buffet and bar available; dress optional. Tickets, price 5s. each, from the Dance Secretary, S.A.C.S., The Law Society's Hall.

PRINCIPAL ARTICLES APPEARING IN VOL. 98

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"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 102–103 Fetter Lane, London, E.C.4. Telephone: CHAncery 6855.

Annual Subscription: Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

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